

P.B.&S. Chemical Company, Inc. and Kenneth Seagrave and Charles Beaver. Cases 6-CA-27107 and 6-CA-27265

June 21, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On October 20, 1995, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief in opposition to the Respondent's exceptions as well as limited cross-exceptions and a supporting brief. The Respondent filed an answering brief to the General Counsel's limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, except as modified below, and to adopt the recommended Order as modified and set forth in full below.³

The judge found that on December 19, 1993, the Respondent unlawfully discharged its drivers, Kenneth

Seagrave and Charles Beaver, for their refusal to cross the picket line and make deliveries at Union Camp, one of its customers. In doing so, the judge correctly observed that the Board has held that the motive of employees who refuse to cross a lawful picket line is irrelevant to whether the refusal is protected under the Act.⁴ The judge also correctly stated that some Circuit courts of appeal have not adopted the Board's position in this respect.⁵ The judge therefore made findings concerning the motivation of Kenneth Seagrave and Charles Beaver for their refusal to cross the lawful picket line and make deliveries to customer Union Camp. The judge found that neither Seagrave nor Beaver expressed direct support for the strikers, but rather had sought to avoid giving the appearance of taking sides and had communicated this to the Respondent. The judge found, however, that Seagrave and Beaver did not express this objective very clearly. He found that Seagrave and Beaver were primarily motivated by their fear of being physically harmed.

After carefully reviewing the record, we disagree with the judge's findings pertaining to Seagrave's and Beaver's motivation. Although we agree that the record shows that Seagrave and Beaver were concerned about their personal safety in refusing to cross the picket line, we find, as discussed below, that the record also establishes that Seagrave and Beaver were equally concerned about remaining neutral in the labor dispute. We further find that the Respondent was aware of both concerns.

The record shows that sometime after the first week of December 1993 Seagrave credibly told Charles Duncan, the Respondent's Proctor branch manager, that he would not cross the picket line at Union Camp. He gave Duncan two reasons: (1) he was concerned about his personal safety, and (2) he also felt that he should not get involved. On December 19, he again repeated to Duncan his twin concerns of personal safety and noninvolvement. When he spoke to Duncan on the telephone before returning to the plant without making the Union Camp deliveries that day, Seagrave expressed anxiety about getting a rock through the truck's windshield. Then, back at the plant, Seagrave later told Duncan that crossing the picket line "put [him] in a bad position with the employees up there

¹ The Respondent asserted in its exceptions that its business would have been jeopardized if it had not discharged Kenneth Seagrave and Charles Beaver for their refusal to cross the picket line and make deliveries to customer Union Camp. The evidence concerning the Respondent's actions after their discharge does not, however, support this claim. The Respondent was able to make the Union Camp deliveries throughout the strike by using employees from its nearby Nitro Branch. It made no effort to hire new employees at Proctor branch, where Seagrave and Beaver had worked, until after the strike was over. We therefore reject the Respondent's contention that in discharging Seagrave and Beaver it acted only to preserve the efficient operation of its business. Compare *Redwing Carriers, Inc.*, 137 NLRB 1545, 1546, 1548 (1962), enf. sub nom. *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), cert. denied 377 U.S. 905 (1964).

We also note that in Board decisions subsequent to *Redwing Carriers*, the Board held that the distinction made between discharge and replacement in economic striker cases was equally applicable in sympathy striker cases, i.e., that an employer could protect his right to continue business operations in the face of a sympathy strike only by replacing, rather than discharging, the strikers. *Torrington Construction Co.*, 235 NLRB 1540, 1541 (1978). Because the Employer had no evident necessity either to replace or discharge Seagrave and Beaver during the strike, however, the distinction is not critical in this case.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

⁴ In *ABS Co.*, 269 NLRB 774, 774-775 (1984), the Board stated:

It is well established that nonstriking employees who refuse to cross a picket line maintained by their fellow employees have made common cause with the strikers, are engaged in protected concerted activities as defined in Section 7 of the Act, and may not be lawfully discharged for these activities. According to Board policy, it is not material that the employee who refuses to cross the picket line . . . is motivated solely by personal fear. Accord: *Whayne Supply Co.*, 314 NLRB 393, 400 (1994).

⁵ See, e.g., *NLRB v. Union Carbide Corp.*, 440 F.2d 54 (4th Cir. 1971).

and [he] would not do it.”⁶ Like Seagrave, Beaver also credibly told Duncan several times that he would not cross the picket line at Union Camp. On those occasions when this topic was discussed at the plant in early December 1993, Beaver told Duncan that he had two reasons for not crossing picket lines—(1) these situations were “dangerous and [his] life could be harmed,” and (2) “[he] didn’t believe in messing with another man’s job.”

Contrary to the judge, we find that both drivers were equally concerned with remaining neutral in the labor dispute and with their personal safety. We thus find that Seagrave and Beaver, who were motivated not only by a fear of physical harm but also by a desire to avoid giving the appearance to the Union Camp strikers of siding with management against the strikers, were engaged in protected concerted activity within the meaning of Section 7 of the Act.⁷ Therefore, we adopt the judge’s conclusion that the Respondent’s termination of Seagrave’s and Beaver’s employment violated Section 8(a)(3) and (1) of the Act.⁸

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, P.B.&S. Chemical Company, Inc., Proctor, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁶Seagrave variously testified:

(i) . . . I did not feel it was right that I be put in a position with the employees at Union Camp, but I had nothing directly involved with them and my personal safety was involved in it.

(ii) . . . this made me feel like—it put me in a bad position with the employees and I had nothing to be—I shouldn’t be involved with what was going on over there. That was between Union Camp and their employees.

I just—I didn’t want to cross the picket line in fear of my life, too, because you never know what happens in situations like that.

(iii) . . . That [fear for my life] is the main reason, yes, and that it put me in the middle of something and I felt that I did not have nothing there, I shouldn’t be involved in what’s going on over there.

(iv) . . . I told Mr. Duncan that I felt uneasy about going across the picket line, going in and out of there, getting dirty looks and stuff from the people on the picket line . . . I told him that I didn’t, that I was not crazy about crossing the picket line. I didn’t feel right about it.

⁷Sec. 7 protects the right of an employee to remain neutral in a labor dispute to the same extent that it protects an employee’s right to participate in the dispute. See *Texaco, Inc. v. NLRB*, 700 F.2d 1039, 1043 (5th Cir. 1981).

⁸We find this case factually distinguishable from the situation presented in *Union Carbide*, supra. In that case, the court determined that because employee Mullins’ refusal to cross a lawful picket line was based solely on fear, his conduct was not protected under Sec. 7 of the Act. See 440 F.2d 54, 56 fn. 1. Here, unlike Mullins, both Seagrave and Beaver refused to cross a lawful picket line based on principle as well as fear.

(a) Terminating the employment of employees because of their protected concerted activities in refusing to cross lawful picket lines maintained by a union at customer locations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kenneth Seagrave and Charles Beaver full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Kenneth Seagrave and Charles Beaver whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Proctor, West Virginia, copies of the attached notice marked “Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 9, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a

⁹If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate the employment of our employees because of their protected concerted activities in refusing to cross lawful picket lines maintained by a union at customer locations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Kenneth Seagrave and Charles Beaver full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kenneth Seagrave and Charles Beaver whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Kenneth Seagrave and Charles Beaver, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

P.B.&S. CHEMICAL COMPANY, INC.

Janice Anne Sauchin, Esq., for the General Counsel.
C. Laurence Woods III, Esq. (Westfall, Talbott & Woods), of
Louisville, Kentucky, for the Respondent.

DECISION

I. INTRODUCTION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, P.B. & S. Chemical Company, Inc. (P.B.&S.), purchases chemicals in bulk and then resells them to manufacturers and mine operators. (As P.B.&S. agrees, the Company is an employer engaged in commerce within the meaning of the National Labor Relations Act (the Act)). P.B.&S.'s headquarters are in Kentucky. The Company has a number of branches. The branch we are concerned about here is in Proctor, West Virginia. The employees at the Proctor branch are not represented by a union. (Hereafter when I refer to

PBS without designating a particular facility, I will be referring to P.B.&S.'s Proctor facility.)

The Charging Parties, Charles R. Beaver and Kenneth Seagrave, were employed as tractor-trailer drivers by P.B.&S. until December 19, 1994. The General Counsel alleges that PBS violated Section 8(a)(3) and (1) of the Act by firing Beaver and Seagrave, and thereafter refusing to rehire them, because they refused to cross a picket line maintained by the employees of one of P.B.&S.'s customers.¹

P.B.&S. agrees that it fired Seagrave on December 19, but contends that the Company did so for reasons other than Seagrave's refusal to cross a picket line. (All events to which this decision refers occurred in 1994 unless otherwise specified.) As for Beaver, PBS contends that it did not fire him. Rather, says the Company, Beaver quit.

I will discuss PBS's discharge of Seagrave on December 19 in section II of this decision; then, in section III, the termination of Beaver's employment on that same day.

II. SEAGRAVE

A few background facts ought to be considered in placing the events of December 19 in context.

1. As of December, Seagrave had worked for P.B.&S. for about 9 years. P.B.&S. considered Seagrave to be good a employee.

2. In 1993 the employees of a major P.B.&S. customer, Koppers Company, went out on strike and set up a picket line. Seagrave told his supervisors that he did not want to make deliveries across the Koppers picket line. Charles Duncan is the branch manager of P.B.&S.'s Proctor facility (and, therefore, the senior P.B.&S. official in Proctor). Duncan responded by telling Seagrave that the only work that P.B.&S. had for Seagrave were the runs to Koppers. Seagrave opted to make the runs, but told Duncan that he did remained uncomfortable about crossing the Koppers picket line and would not cross it if the pickets gave him "any hassle."² No hassles developed, and Seagrave made the runs uneventfully.

3. In early December Seagrave and fellow P.B.&S. truck-driver Beaver learned about the possibility of a strike by the employees of an important new customer of PBS, Union Camp Chemical Company. At an impromptu meeting with Duncan, the two employees spoke about this possibility and said that they would not cross any picket line that the Union Camp employees might establish. Seagrave gave two reasons for that position. One was his "personal safety"—that he feared for his life. The other was that he did not want to "be involved with what was going on over there; that was between Union Camp and their employees."³ Duncan responded by saying that: (a) someone from Union Camp would call him if there was to be a strike and that he would pass the information on to Beaver and Seagrave; (b) P.B.&S.'s policy was to make deliveries to customers during strikes unless there was a threat of violence; and (c) Beaver and Seagrave should understand that if there was a strike at Union Camp and if they refused to make deliveries there,

¹ The General Counsel has filed an unopposed motion to correct the transcript, which is granted.

² Tr. 29.

³ Tr. 25 and 26.

that would affect the number of hours per week that P.B.&S. could employ them (and, therefore, their pay).

4. Union Camp's production and maintenance employees are represented by Local 20 of the Chemical Workers which, the record shows, is a labor organization within the meaning of the Act. (In its answer to the complaint, P.B.&S. denied that to be the case. P.B.&S. did not pursue that contention on brief.) That Union called the employees out on strike on December 16. The Union Camp employees remained out on strike until mid-February 1995. An official of Local 20, Jim Bealer, testified that throughout that time a picket line was in place at Union Camp's facility in Dover, Ohio (the only Union Camp facility with which P.B.&S. did business). But Bealer often was elsewhere, and it is thus entirely possible that there were occasions when pickets were not present. Bealer credibly testified that the pickets were instructed to request truckdrivers not to complete their deliveries to Union Camp but otherwise were not to obstruct traffic into or out of Union Camp's facility.

5. Ed Ankrom is P.B.&S.'s plant manager and dispatcher at Proctor. (Ankrom reports to Duncan.) On Friday, December 16, he ordered Seagrave to deliver a tank load of caustic soda to Union Camp by 8 a.m. on Monday, December 19. Seagrave left Proctor early Monday morning, in accordance with Ankrom's instructions.

No one at P.B.&S. knew about the strike at Union Camp until early Monday morning. Seagrave accordingly arrived in Dover at about 7 a.m. not realizing that a strike was underway. But as Seagrave got within about 4 blocks of Union Camp, he received a call on his truck's citizens' band radio from someone who described himself as a Union Camp employee, said that the employees were on strike, that a picket line was up, and that the Union Camp employees were asking drivers not to cross the picket line. Seagrave then turned his truck around (without getting within view of the Union Camp facility), pulled onto the parking lot of a nearby fast food restaurant, and, at about 7:30 a.m., called Ankrom.

Seagrave told Ankrom that the Union Camp employees were on strike and that he was unwilling to cross the picket line. Ankrom told Seagrave that he was not asking Seagrave to attempt to drive through the picket line, that Seagrave should stay put, and that someone would telephone him about what to do next.

Duncan arrived at P.B.&S. a few minutes after Seagrave's telephone call. Ankrom gave Duncan the news. Duncan called Union Camp, spoke to several different people there, and was told that, while there had been no pickets earlier, some were there now. Notwithstanding the pickets, Duncan was informed, trucks were entering and leaving Union Camp's plant freely. A Union Camp security guard advised Duncan that if P.B.&S.'s trucks used Union Camp's main gate, they could enter the plant without having to stop. Duncan then called P.B.&S.'s headquarters to report on the situation at Union Camp. Two senior P.B.&S. officials told Duncan that, unless there was a risk of violence, they wanted Duncan to do whatever was necessary to ensure that P.B.&S.'s deliveries to Union Camp be made as scheduled.

In the meantime, a Union Camp official called Seagrave (at the restaurant) to say that Union Camp needed the load that Seagrave had hauled into Dover and that guards were available to protect Seagrave as he entered and exited the facility. But Seagrave said he would not make the delivery.

Seagrave then telephoned Duncan. Duncan told Seagrave that trucks were entering and leaving the Union Camp plant without difficulty and that guards were at the plant to protect him. Duncan then ordered Seagrave to make the delivery.

According to Duncan, Seagrave responded that he would not cross the picket line. Duncan reminded Seagrave that P.B.&S. had promised to make the delivery and that the only work that P.B.&S. had for Seagrave were the runs to Union Camp. But Seagrave, said Duncan, again refused to make what Seagrave called "the God damn delivery" (that is Duncan purportedly quoting Seagrave)⁴ and said that he was bringing the truck back to Proctor. Seagrave then hung up and did indeed drive back to the P.B.&S.

Seagrave, however, testified that when Duncan ordered him to cross the picket line, he expressed concern for his safety. But Duncan presented an ultimatum: either make the delivery or have his employment terminated. Seagrave hung up the telephone and returned to P.B.&S..

On arriving at P.B.&S., Seagrave told Ankrom that he had been fired by Duncan. Ankrom, who had been working with Seagrave for many years, brought Seagrave into Duncan's office so that the matter could be discussed further. Seagrave testified that he told Duncan that he wanted to continue to drive for P.B.&S. but that he was unwilling to cross the picket line at Union Camp because it put Seagrave "in a bad position with the employees" at Union Camp.⁵ According to Seagrave, Duncan then said that although he was sorry to lose Seagrave, Seagrave "no longer [had] a job" with P.B.&S.⁶ On the witness stand Seagrave denied using any expletives or profanity during this conversation.

Duncan painted a somewhat different picture of this meeting. According to Duncan, the position he expressed was that Seagrave would remain an employee of P.B.&S. even if Seagrave refused to cross the picket line at Union Camp. But since the only work that P.B.&S. had for Seagrave were the runs to Union Camp, P.B.&S. might not have "anything . . . for him to do."⁷ Duncan testified that he had told this first to Ankrom, then to Seagrave in the course of his earlier telephone conversation with Seagrave, and then again to Seagrave when Ankrom brought Seagrave into his office. Duncan went on to testify that in that meeting with Seagrave and Ankrom, Seagrave cursed at Duncan. Only then, according to Duncan, did Duncan fire Seagrave. He did so, said Duncan, because of Seagrave's "total uncooperativeness . . . not willing to work [with] me on resolving the problem . . . plus, you know, cussing me out."⁸

For a number of reasons, I credit Seagrave's version, not Duncan's, of his telephone conversation with Duncan and his meeting with Duncan and Ankrom.

First, a separation report prepared by Duncan on December 19 supports Seagrave's version of the events that day. It states that Seagrave was discharged for "insubordination" in that Seagrave

Refused to make a delivery to a customer. Kenneth Seagrave was to make a delivery to Union Camp Chemical in Ohio OH. Upon arriving at the customer

⁴ Tr. 82.

⁵ Tr. 33.

⁶ Tr. 33.

⁷ Tr. 80.

⁸ Tr. 91.

he found that they were on strike and had set up a picket line. He called in [and] said he was not making the delivery. After checking with the plant and being informed that everything was [quiet] and other trucks were entering and leaving the plant without problems, I instructed Kenny to make the delivery which he again refused to do.⁹

Second, Duncan testified that he told Ankrom as well as Seagrave that one of his concerns about Seagrave's unwillingness to cross the Union Camp picket line was that, apart from the Union Camp runs, P.B.&S. had no work for Seagrave. But Ankrom, on the witness stand, did not remember Duncan saying anything like that to him.

Third, no one asked Ankrom about the Duncan-Ankrom-Seagrave meeting on December 19. That seems strange to me. Ankrom was, and is, a P.B.&S. supervisor. He was indisputably present at that meeting. He testified at the hearing. Under these circumstances one would expect P.B.&S. to have asked him to describe what happened at the meeting. Because P.B.&S. did not, I infer that, had Ankrom been questioned about the meeting, his testimony would have been inconsistent with Duncan's. See *Champion Rivet Co.*, 314 NLRB 1097, 1098 fn. 8 (1994); accord: *Iron Workers (J. W. Reinforcing)*, 317 NLRB 817, 818 (1994); *Top Gun, Inc.*, 313 NLRB 185, 189 (1993); and *Chevron U.S.A.*, 309 NLRB 59, 61 (1992).

Fourth, Seagrave testified that on December 20 P.B.&S.'s manager of human resources, Kenneth Curry, telephoned Seagrave to ask Seagrave what had happened between him and Duncan. Seagrave responded by saying that Duncan fired him because he refused to cross a picket line at Union Camp. Curry replied, according to Seagrave, that "it was company policy to make deliveries to our customers and to serve our customers."¹⁰ That, of course, suggests that that Seagrave's refusal to cross the picket line was in fact the reason that Duncan fired Seagrave. Curry did not testify and thus this testimony by Seagrave is uncontroverted.

There is a P.B.&S. branch in Nitro, West Virginia. (The caustic soda that Seagrave and Beaver had been delivering to Union Camp originated at the Nitro branch.) Later, on December 19 a P.B.&S. driver based in Nitro completed the run without incident to Union Camp that Seagrave had been assigned.

Drivers from the Nitro branch continued to make the deliveries to Union Camp throughout the duration of the strike that the Proctor branch otherwise would have handled. The record does not tell us whether the Nitro branch had to hire any additional drivers to handle the extra runs. The record does tell us that P.B.&S.'s Proctor branch did not hire any drivers until February 20, 1995, when it hired one.

I conclude that P.B.&S.'s termination of Seagrave's employment violated Section 8(a)(3) and (1) of the Act.

A driver employed by one employer who refuses to make an assigned delivery across a picket line set up by the employees of a second employer is thereby engaged in protected activity,¹¹ whatever the driver's motivation for that refusal.¹²

Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by firing the driver because of that refusal to cross the picket line¹³ unless the employer

... acted only to preserve the efficient operation of his business, and terminated the services of the employee only so it could immediately or within a short period thereafter replace [him] with [another] willing to perform the scheduled work.¹⁴

Here, I have found that Duncan fired Seagrave, in the course of a meeting with Seagrave at the P.B.&S. facility, because Seagrave refused to cross a picket line at Union Camp. As for whether that action by P.B.&S. was necessary "to preserve the efficient operation of [the] business," that was for P.B.&S. to show. The Company failed to carry that burden. On the one hand, the record affirmatively shows that P.B.&S.'s Proctor branch did not hire another driver for 2 months after Seagrave's departure. On the other, there has been no showing that P.B.&S. replaced Seagrave by adding another driver to the work force of any of its other branches in order to handle the work that Seagrave had been doing.

III. BEAVER

Turning first to the relevant pre-December 19 circumstances and events involving Beaver:

1. As of December (1994) Beaver had been employed by P.B.&S. for more than 15 years. P.B.&S. considered Beaver to be a good employee.

2. As discussed earlier, in 1993 the employees of P.B.&S. customer Koppers Company went out on strike. Beaver refused to drive his truck across the picket line. P.B.&S. honored that refusal, switching him to non-Koppers runs. P.B.&S. did not discipline Beaver in any way.

3. Beaver made a run to Union Camp on December 8. While he was at Union Camp a "union employee" and a "company man" (in Beaver's words) angrily shouted at one another about matters relating to the unloading of Beaver's truck.¹⁵ The union man threatened the other with physical harm. A few days later Beaver made another run to Union Camp. When he arrived there, some "union people" (to quote Beaver again)¹⁶ asked Beaver for his name and address so that they could call on Beaver as a witness in support of their union brother. When Beaver refused to provide his name, one of the employees asked Beaver to telephone him. Beaver never did. The incident left Beaver feeling uncomfortable about his relationship with Union Camp's unionized employees.

4. Shortly after that incident, Beaver (along with Seagrave) met with Duncan. As discussed in section II, above, they spoke of the possibility of a strike at Union Camp. Beaver said that if the strike occurred, he would not make deliveries to Union Camp. Duncan said that he would be informed if there was to be a strike at Union Camp and he would pass that information on to Beaver and Seagrave.

Turning now to December 19, Beaver was at P.B.&S. preparing for a run to a P.B.&S. facility in Nitro, West Virginia, when Seagrave first telephoned P.B.&S. that morning and

⁹G.C. Exh. 6. The above quotation is everything that the report has to say about P.B.&S.'s discharge of Seagrave.

¹⁰Tr. 35.

¹¹E.g., *G & S Transportation*, 286 NLRB 762, 766 (1987).

¹²E.g., *Whayne Supply Co.*, 314 NLRB 393, 400 (1994).

¹³E.g., *G & S Transportation*, supra.

¹⁴*Redwing Carriers*, 137 NLRB 1545, 1547 (1962).

¹⁵The quotations are from Tr. 49.

¹⁶Tr. 50.

spoke to Ankrom. After the call, Ankrom, passing on the information that Seagrave had just provided, told Beaver that Union Camp's employees were on strike and that Seagrave "wasn't crossing the picket line."¹⁷ Beaver got upset, in part because Duncan had not fulfilled what Beaver considered to be a promise by Duncan to give Seagrave and Beaver advance notice of any strike at Union Camp. Beaver nonetheless continued his preparations for his run to Nitro. He then returned to Ankrom's office to find out if there was any more information about Seagrave. Duncan had preceded Beaver to Ankrom's office.

As Beaver entered the office he overheard Duncan tell Ankrom that P.B. & S.'s headquarters had demanded that the delivery to Union Camp be made as scheduled notwithstanding the strike there. Duncan, seeing Beaver in the office, then turned to Beaver.

Duncan and Beaver both testified about what happened next, and their testimony differs. In most respects I credit Beaver, not Duncan, because Beaver's testimony is more consistent with two reports that Duncan later wrote (and which will be discussed below) and because, as in the case of the Duncan-Seagrave confrontation discussed earlier, Ankrom was present at the exchange between Duncan and Beaver but did not testify about it.

As touched on in section II, minutes earlier a Union Camp official had told Duncan that trucks were making deliveries through Union Camp's main gate without difficulty. Duncan asked Beaver whether he knew the location of that main gate and then said something on the order of, "that's the gate you'll be using to make deliveries to Union Camp." Beaver, having in mind that he told Duncan earlier that month that he was unwilling to cross a picket line at Union Camp, assumed that Duncan's remark was the equivalent of an ultimatum. Beaver either had to make deliveries to Union Camp or had to leave P.B. & S.'s employ.

Beaver left Ankrom's office. Then, when Duncan left Ankrom's office, Beaver returned and asked Ankrom: "should I clean my stuff out of [the] truck today, or should I wait 'till tomorrow and be fired?" Ankrom had no response. Beaver went out to the truck he was scheduled to drive to Nitro, removed his belongings, returned to the office area, tossed the keys to the truck onto Duncan's desk, and demanded that P.B. & S. pay him his pension money and whatever else the Company owed him as soon as possible. Beaver then turned, left the plant, and went home (without undertaking that run to Nitro).

Later that day Ankrom, on Duncan's orders, telephoned Beaver and asked that Beaver return to P.B. & S. Beaver did so, meeting with Duncan and Ankrom. Again, while Duncan and Beaver testified about this meeting, Ankrom did not. The following description of the meeting accordingly relies primarily on Beaver's testimony.

Duncan wanted Beaver to continue to drive for P.B. & S. He told Beaver that. But he also insisted that Beaver be willing to cross the picket line at Union Camp to make deliveries. P.B. & S.'s headquarters was demanding that deliveries to Union Camp continue, Duncan said. Beaver responded that he had had "trouble" at Union Camp (referring to his refusal to be a witness for the union regarding the incident

at Union Camp),¹⁸ that the employees there did not like him. Duncan assured Beaver that he would not be asked to endanger himself. But Beaver continued to make it plain that he would not cross the Union Camp picket line. Somewhere in the course of this conversation Beaver pointed out that back in 1993 he had refused to cross the picket line at Koppers. Duncan retorted that "you should have been fired for that . . . we let that one go."¹⁹ Finally, after hearing that Seagrave had been fired, Beaver said that he considered himself fired. Duncan responded that Beaver had not been fired, that he had quit. Beaver then left the P.B. & S. facility.

Duncan wrote a separation report on Beaver that same day. According to that report:

At 8 a.m. Chuck Beaver turned in his keys to our [truck] #60702. He did this because he was scheduled to make a delivery to Union Camp Chemical who is on strike. Chuck has said he was not going to cross a picket line.²⁰

In a separate "Termination Record," also dated December 19, Duncan wrote:

At 8 a.m. on Dec. 19th Chuck Beaver walked into my office and placed his keys to company trucks and office on my desk. Chuck was scheduled to make a delivery on Dec. 20th to Union Camp Chemical who is on strike. At this time there had not been any discussion with Chuck on this matter. Chuck has stated that he would not cross a picket line in the past.²¹

As indicated in section II, P.B. & S.'s Proctor branch replaced neither Seagrave nor Beaver for 2 months, at which time that branch hired one driver. As also indicated in section II, as a result of the departures of Seagrave and Beaver, P.B. & S.'s Nitro branch handled deliveries to Union Camp that it otherwise would not have. But the record is silent about whether that required the Nitro branch (or any other P.B. & S. branch) to hire any additional drivers.

Unlike the case with Seagrave, no P.B. & S. official told Beaver that he was fired. Rather, what happened was that Duncan, within a week or so after Beaver had said that he would not cross a picket line at Union Camp, told Beaver that Beaver was going to be assigned runs to Union Camp. (That occurred on the morning of December 19, when Duncan told Beaver that the main gate at Union Camp's Dover facility was "the gate you'll be using to make deliveries to Union Camp.") Moments earlier, Beaver had heard Duncan say that P.B. & S.'s headquarters demanded that deliveries to Union Camp be made as scheduled notwithstanding the strike there.

Beaver thereupon undertook actions signifying that he quit the employ of P.B. & S.

Even at this point, P.B. & S.'s management had to have recognized that Beaver, a 15-year employee of the Company who had long been clear about his unwillingness to make deliveries across picket lines, had quit only because he had been told he would be assigned runs to Union Camp.

¹⁷ Tr. 42.

¹⁸ Tr. 48.

¹⁹ Tr. 51.

²⁰ G.C. Exh. 5.

²¹ Id.

In any case, Duncan sought to have Beaver continue as an employee of P.B.&S. and, to this end, met with Beaver later in the day on December 19. On Beaver's part, he made it clear that he wanted to continue to drive for P.B.&S. so long as that did not entail crossing the Union Camp employees' picket line. But Duncan insisted the Beaver be willing to cross that picket line. Beaver, who knew that Seagrave had already been fired for refusing to cross the picket line, stated that he considered himself fired and left the premises.

The employer of driver who quits when faced with a directive giving him no alternative but to cross the picket line at another employer whose employees are on strike violates Section 8(a)(3) and (1) of the Act.²² Duncan's communications to Beaver caused Beaver reasonably to come to the belief probably accurately—that continuing to work for P.B.&S. unavoidably meant crossing the picket line at Union Camp to make deliveries. Thus those communications by Duncan were “legally equivalent to discharging [Beaver] for his protected activities.”²³ I therefore conclude that P.B.&S.'s actions toward Beaver violated Section 8(a)(3) and (1) of the Act.

IV. SEAGRAVE'S AND BEAVER'S REASONS FOR REFUSING TO CROSS THE PICKET LINE

I have not heretofore discussed why Seagrave and Beaver did not want to cross the picket line at Union Camp—what their motivations were in refusing Duncan's order to make deliveries to Union Camp—because, from the Board's point of view that is beside the point.²⁴ But not all Federal courts of appeal are of the same view. See *Kellogg Co. v. NLRB*, 457 F.2d 519 (6th Cir. 1972); *NLRB v. Union Carbide Corp.*, 440 F.2d 54 (1971). In the event of review, therefore, I find as follows about the two drivers' motivations.

One of Seagrave's and Beaver's concerns about crossing a picket line was, clearly, their fear of being badly injured. Beaver's witnessing, on December 8, the altercation between

a prounion employee and a “company man” added to that concern. (Beaver, it should be noted, discussed that incident with Seagrave.) Both Beaver and Seagrave communicated this concern to P.B.&S.'s management, and both indicated to management that fear of being physically harmed was their primary reason for refusing to cross the Union Camp picket line.

Both Beaver and Seagrave also wanted to avoid giving the appearance to strikers of siding with management against the strikers. Both employees also communicated this to P.B.&S.'s management, albeit less clearly.²⁵

Finally, based on the overall impression I got of the two employees while they were testifying, it seems to me to be entirely possible that both did in fact support, as a matter of principle, the efforts of employees on strike to gain improvements in the terms and conditions of their employment. But neither testified to that effect. And in view of the lack of supporting evidence, I am not in a position to make any finding about either Seagrave or Beaver wanting to support the goals of the strike. In any event, neither so informed P.B.&S.'s management.

REMEDY

P.B.&S., in violation of Section 8(a)(3) and (1) of the Act, terminated the employment of its employee Kenneth Seagrave and constructively terminated the employment of its employee Charles Beaver. The recommended Order accordingly requires P.B. & S. to offer to reinstate Seagrave and Beaver and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

²² *G & S Transportation*, supra at 766.

²³ Id.

²⁴ See *Wayne Supply Co.*, supra.

²⁵ See, in this connection, *Blue Circle Cement Co.*, 311 NLRB 623, 624, 634 (1993) (discussing dual motivation on the part of an employee).